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SUPREME COURT, U.S.

No. 07-890

IN THE

Supreme Court of the United States

ARE ACQUISITIONS, LLC,

Petitioner,

v.

MICHAEL G. HANNA, Jr., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can a state court be compelled to reinstate a dismissed negligence claim in a civil suit for damages arising out of a private party's past clean up of hazardous waste?

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JURISDICTION

This Court does not have jurisdiction to grant the requested relief. The Petition challenges a state court judgment in which Petitioner's "negligence" count in a civil damages suit was dismissed for failure to state a claim upon which relief could be granted. The provision applicable to state court judgments is 28 U.S.C. § 1257. Under that section, this Court does not have jurisdiction because the Maryland courts did not call into question the validity or constitutionality of any treaty or statute of the United States.

STATEMENT OF THE CASE

A. Introduction

The Petition arises out of a civil suit filed by Petitioner against a number of persons and entities in the Circuit Court for Montgomery County, Maryland. The suit sought damages against the officers, directors and investors of a bankrupt corporation that had leased commercial office and laboratory space from Petitioner. As to the sole issue now before this Court, the suit was dismissed for failure to state a claim upon which relief could be granted. That dismissal was affirmed by an intermediate appellate court.

The Petition is directed to a decision by the Maryland Court of Appeals denying Petitioner's "Motion to Reconsider" the denial of a conditional cross-petition for

a writ of certiorari. (Petition, pp. 3, 23). The appeal to that court, Maryland's highest appellate court, is discretionary. If granted, the Petitioner's cross-appeal would have addressed the holding of Maryland's intermediate appellate court that Petitioner's Second Amended Complaint did not adequately allege a cause of action sounding in "negligence" against the individual officers and directors of the bankrupt tenant.

The intermediate appellate court (the Maryland Court of Special Appeals) issued its opinion on August 24, 2006. (App. 1-44). That opinion was not addressed solely to the dismissal of the "negligence" count. It covered a wide range of issues and counts in the Second Amended Complaint that were either dismissed on the pleadings or subject to summary judgment. However, the "negligence" issue was the sole focus of Petitioner's Conditional Cross-Petition for a Writ of Certiorari in the Maryland Court of Appeals, and of Petitioner's Motion for Reconsideration of the denial of the Conditional Cross-Petition.

The trial court dismissed the "negligence" count for failure to state a claim upon which relief could be granted pursuant to Md. Rule 2-322(b)(2). The legal standards governing the decision were comparable to those governing motions to dismiss under Fed. R. Civ. P. 12(b)(6) prior to the decision of this Court in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). All well pleaded facts, and reasonable inferences drawn therefrom, were taken as true, and considered *de novo* on appeal. *See Afamefune v. Suburban Hosp., Inc.*, 385 Md. 677, 870 A.2d 592 (2005); *Bennett Heating & Air Conditioning, Inc. v. Nationsbank of Md.*, 342 Md. 169, 674 A.2d 534 (1996).

As demonstrated below, the state court result was consistent with federal and state law, and with decisions of other courts that have addressed the identical issue.

B. History of the Litigation[1]

Petitioner is the owner of commercial property in Rockville, Maryland that was leased to Intracel Corp., a bio-technology company. Respondents were officers or directors of Intracel Corp. Petitioner evicted Intracel Corp. from the premises for non-payment of rent effective May 1, 2001. Intracel Corp. filed for bankruptcy in the United States Bankruptcy Court for the District of Maryland in September 2001.

Petitioner filed its initial complaint against several officers and directors of Intracel in September 2002. The complaint sought $500,000 in damages relating to the cost of removing allegedly hazardous materials from the leased site after Intracel was evicted, plus an additional sum in "lost rent." Petitioner later expanded the allegations and the number of defendants (to include a holding company and an investment firm), in an Amended Complaint, followed by a Second Amended Complaint that was filed in March 2004.

The Second Amended Complaint contained twelve counts that set out a number of theories of liability, including trespass, waste, negligence, alter ego liability, respondeat superior, and fraud. In addition to $3 million

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[1] A detailed history, particularly as it relates to the "negligence" issue Petitioner asks this Court to address, is contained in the Court of Special Appeals' opinion at App. 1 – 15.

in alleged economic loss, the Second Amended Complaint asked for $5 million in punitive damages.

All counts of the Second Amended Complaint were eventually dismissed for failure to state a claim, or on summary judgment. Petitioners selected only some of the counts for appeal. Only the "negligence" count is pertinent here.

The "negligence" count contained a paragraph that referenced federal law.[2] It stated (in ¶ 114) in conclusory terms that certain unspecified actions of all defendants:

> constituted violations of numerous environmental statutes and regulations, including but not limited to the Atomic Energy Act, the Resource Conservation and Recovery Act, 42 U.S.C. § 6922 (and related regulations at 40 C.F.R. § 262.30 to 262.34) and 42 U.S.C. §§ 6928(d)(1) to 6928(d)(2); Md. Code, Environmental Article, Titles 7 and 8; and Sections 26:13.11 and .12 of the Code of Maryland Regulations. These statutes were enacted as safety measures, and were designed to protect a class of persons which included ARE [Petitioner], its employees and other occupants of the Property.

The identical wording reappeared in an awkward count labeled "Aiding and Abetting Negligence" (which

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[2] The recitation of the pleading history here is intended to address Sup. Ct. Rule 14(g)(i), the requirements of which Petitioners have largely neglected.

is not at issue here), but there were no other references to federal law in any of the other 218 paragraphs of the Second Amended Complaint.

At this point, the issues are narrower than those raised in ¶ 114. The Atomic Energy Act was not briefed to the Maryland Court of Special Appeals, was not addressed in the Conditional Cross-Petition or in the Motion for Reconsideration, and is not mentioned in the Petition to this Court. In addition, Petitioner never claimed to have incurred damages resulting from any "safety" issues at the site; Petitioner has consistently limited its claim to $3 million in alleged economic loss resulting from clean-up expenses and lost rent, plus punitive damages.[3] Finally, although Petitioner expresses disagreement with the Court of Special Appeals' interpretation of the cited Maryland Regulations (COMAR), the argument is irrelevant and unavailing here. "Save in exceptional circumstances, . . . we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common." *Am. Ry. Express Co. v. Commonwealth of Ky.*, 273 U.S. 269, 272 (1927).

The trial court dismissed the "negligence" count without substantive discussion, stating only (in an oral opinion delivered from the bench): "As to Count 3, the claim of negligence as to all defendants, for the reasons asserted by the defendants in their brief, that motion is granted. That count is dismissed."

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[3] The claim for punitive damages is no longer at issue.

The reasons stated "in the brief "may be fairly categorized as falling into two lines of argument, as follows. First, the preceding (*i.e.*, first) Amended Complaint had been dismissed for lack of specificity, with leave to amend. In granting leave to amend, however, the trial judge required the plaintiff to re-plead the negligence allegations with more specificity; which defendants had committed what tortious violations of law by virtue of what acts or omissions? The brief posited (correctly) that the Second Amended Complaint failed to meet that charge.

Second, the brief asserted that none of the cited statutes addressed the allocation of clean-up costs as between private parties, particularly as between a landlord and a tenant. In other words, the plaintiff was not within the group of persons whom the cited statutes sought to protect, especially where the sole issue raised in the action was economic loss.

The former line of argument would not be pertinent here but for the admonition of Sup. Ct. Rule 15.2 to point out in this Opposition any misstatements of fact in the Petition. Virtually all of the Petition's factual assertions at pp. 6 -10 were hotly disputed and remained so after preliminary motions disposed of the case. For example, Respondent Richard Cox, the general counsel of Intracel Corp., did not control the company's operations or finances. Indeed, he was charged in Petitioner's summary judgment briefing merely with failing to "press the issue" of securing additional funding from investors for clean-up. Respondent David Fox was a director of Intracel for only a very short time, participated in only one board meeting (by telephone), and knew nothing

about Intracel's eviction or what materials were stored on site.[4] The other directors did not misallocate funds from the sale of a corporate asset; they paid the proceeds of the sale to the persons or entities that had a security interest in the asset. At any rate, if they had misallocated assets, the claim was more appropriately made under the "alter ego" claim (which was dismissed and not appealed), or by the trustee in bankruptcy on behalf of the bankrupt corporate entity. *See, Schertz-Cibolo-Universal City v. Wright,* 25 F.3d 1281, 1284 (5th Cir. 1994); *Angell v. Kelly,* 336 F. Supp.2d 540, 544 (M.D. N.C. 2004); *Tafflin v. Levitt,* 92 Md. App. 375, 608 A.2d 817, *cert. denied* 328 Md. 447, 614 A.2d 974 (1992); *Pritchard v. Myers,* 174 Md. 66, 197 A. 620 (1938). Finally, ARE did not attempt to induce Respondents to return to the site after eviction. ARE would not permit Respondents to return to do any clean-up with their own employees, although they were ready, willing, and able to do so. Instead, ARE barred Respondents from the premises and insisted that they retain a private contractor whose initial estimate for clean-up was approximately $250,000.

These, and dozens of other disputed facts, impractical to list here, including ARE's contributory negligence in allocating a $230,000 security deposit to back rent rather than to clean-up, were never resolved. That is why, when the intermediate appellate court

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[4] Petitioner also failed to appeal any issue relating to David Fox in the Maryland appellate courts, in that its briefs did not cite or discuss a single factual allegation or issue as to Mr. Fox. *See, Monumental Life Ins. Co. v. United States Fid. & Guar. Co.,* 94 Md. App. 505, 544, 617 A.2d 1163 (1982). As a result, Mr. Fox is not properly named as a Respondent in this Court.

remanded the "trespass" count, it invited all of the defendants to file further summary judgment motions.[5] (App. 34).

It is, however, the second line of argument that goes to the heart of the dispute here. Sup. Ct. Rule 14.4(g)(i) requires the Petitioner to include in the Petition:

> pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion . . .), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

The Petition does not quote, because it cannot quote, any ruling by any Maryland court which holds that, as Petitioner characterizes it:

> a tenant . . . owes no legal duty to manage [hazardous or radioactive] waste in accordance with the requirements of the federal Resource Conservation and Recovery Act ('RCRA'), 42 U.S.C. §§ 6901-6992k, . . . in stark conflict with decisions of several courts of appeals that

[5] The "trespass" issue was the sole focus of Respondents' appeal to the Maryland Court of Appeals, which reversed the Court of Special Appeals. That decision terminated the suit in its entirety, until the present Petition was filed.

> have affirmed criminal convictions and civil liability premised on the opposite proposition.

(Petition, p. 3).

The actual ruling of the Maryland Court of Special Appeals was merely that: "RCRA was not designed to protect private entities, like ARE, from economic harm." (App. 18). The holding is neither controversial nor fit for review in this Court.

REASONS FOR DENYING THE PETITION

A. The Petition is Untimely.

The substantive decision Petitioner attempts to place at issue was handed down by the Maryland Court of Special Appeals in August 2006. (App. 1 – 44). Thereafter, Petitioner sought further review in the form of a discretionary appeal to the Maryland Court of Appeals. On December 6, 2006 Respondents' petition for a writ of certiorari was granted by the Court of Appeals (on the sole issue that the intermediate appellate court had decided adversely to Respondents), but Petitioner's conditional cross-petition was denied.

Sup. Ct. Rule 13.1 states:

> A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is

> filed with the Clerk within 90 days after entry of the order denying discretionary review.

This Petition should have been filed no later than March 6, 2007.[6]

This argument is not a mere procedural nicety. As Justice Rehnquist wrote, "[a] high degree of selectivity is . . . enjoined upon [the Supreme Court] in exercising [its] certiorari jurisdiction." *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting). Here, Petitioner's dilatory pursuit of the

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[6] The operative pleading which ostensibly gives rise to the Petition, *i.e.*, Petitioner's state court Motion for Reconsideration of the December 6, 2006 order, was also untimely. The pertinent Md. Rule is 8-605. It provides that a motion for "reconsideration of a decision by the Court that disposes of the appeal" must be filed "(1) before the issuance of the mandate or (2) within 30 days after the filing of the opinion of the Court, whichever is *earlier*." (Emphasis added). Petitioners waited until the day before the issuance of the mandate before filing their Motion for Reconsideration in September 2007. That is, they necessarily elected the *later* of the two triggering events, not the *earlier*, because the opinion that completely terminated *their* appeal was issued on December 6, 2006. Thus, even in the unlikely event that the reference in Sup. Ct. Rule 13.3 to "a petition for rehearing" may be construed to embrace a "Motion for Reconsideration of a Denial of a Conditional Cross-petition for a Writ of Certiorari," the Petition here is still untimely because the Motion for Reconsideration was itself untimely. Petitioner cannot demonstrate that the Maryland Court of Appeals lacked an adequate procedural basis on which to deny the Motion for Reconsideration, which that court did quickly, without comment, and without need of any reply from Respondents. *See, Adams v. Robertson*, 520 U.S. 83, 87-88 (1997).

issue now results in a strained request that this Court review the decision of the Maryland Court of Appeals to deny a discretionary review of a lower court's decision. (Petition pp. 3, 23). The decision whether to review the intermediate appellate court's decision, however, is left by statute to the discretion of the Maryland Court of Appeals. Md. Cts. & Jud. Proc. Code §§ 12-201, 12-203.

> The certiorari process serves an important function in Maryland's system of jurisprudence. It allows this Court to select and review cases that we deem to be "desirable and in the public interest. . . ." In exercising this broad discretion, we limit the issues that we elect to review by denying petitions for certiorari in whole or in part, so that we may deal directly with the issues selected.

Jones v. State, 357 Md. 408, 419, 745 A.2d 396, 401-02 (2000) (citations omitted).

Petitioner had the opportunity under Sup. Ct. Rule 13.1 to challenge the substantive decision of the Maryland Court of Special Appeals. Now, however, Petitioner asserts a challenge to the Court of Appeals' exercise of its discretion to determine what is "desirable and in the public interest." The challenge undermines Maryland's appellate process as established by statute and administered by its highest court.

Sup. Ct. Rule 10(b) provides that a petition for certiorari may be granted where:

> a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States Court of Appeals....

The Maryland Court of Appeals made no such decision.

B. This Court Lacks Jurisdiction to Grant the Requested Relief.

The grant of jurisdiction to this Court for review on a writ of certiorari is found at 28 U.S.C. § 1257(a), which states:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties, statutes of, or any commission held or authority exercised under, the United States.

The Maryland courts decided none of the above in this action. They did not question the validity of any treaty or statute of the United States, never called into question the statute of any State on any grounds, and did not deprive Petitioners of any right or immunity conferred by the Constitution, laws, or commissions of the United States.

The only issue decided by the Maryland Court of Special Appeals was the legal sufficiency of Petitioner's "negligence" claim as pled in the Second Amended Complaint. That pleading's reference to federal environmental statutes was pertinent only within the framework of Maryland tort law. That law requires sufficient allegations of: (1) a duty owed by defendant to the plaintiff to protect the plaintiff from injury; (2) breach of that duty; (3) actual injury or loss, and; (4) injury or loss proximately resulting from the breach. *Patton v. United States of Am. Rugby Football*, 381 Md. 627, 851 A.2d 566 (2004). Within this legal structure, evidence of a statutory violation *may* furnish evidence of negligence but:

> In Maryland, the violation of a statute does not constitute negligence *per se.* Rather, *the breach of a statutory duty may be considered some evidence of negligence where three requirements are met.* First, the plaintiff must be a member of the class of persons the statute was designed to protect. Second, the injury suffered must be of the type the statute was designed to prevent. Third, the plaintiff must present legally sufficient evidence to

> demonstrate that the statutory violation was the proximate cause of the injury sustained.

Joseph v. Bozzuto Mgmt. Co., 173 Md. App. 305, 326, 918 A.2d 1230, 1242 (2007); *See, Atl. Mut Ins. Co. v. Kenney*, 323 Md. 116, 124, 591 A.2d 507, 510-511 (1991).

The Court of Special Appeals concluded that, whatever RCRA violations may have been alleged, the allegations were futile because: "the statutes relied upon by [Petitioner] were not intended to protect against the type of harm appellant experienced." (App. 17). "RCRA was not designed to protect private entities from economic harm." (App. 18). In other words, alleged RCRA violations do not satisfy the first two required elements of Maryland law listed in the *Joseph* decision as quoted above.

Thus the Petitioner fails to take into account a critical distinction between a decision that contravenes federal law, and one that merely restricts the scope of that federal law's reach into the realm of state tort law. The latter type of decision is, and should be, uniquely left to the state court's discretion.

Maryland is among the minority of states that treat statutory violations as mere evidence of negligence, not as negligence *per se*. *Joseph*, 173 Md. App. at 329. Viewed in that context, because the RCRA provisions cited in the Second Amended Complaint do not prescribe anything about tort law, it is within the purview of the state court "*to adopt the standards or rules of conduct from such statutes and to apply them to tort cases.*" *Id., citing* B. Dobbs, THE LAW OF TORTS, § 134 at 315 (2001).

This Court does not generally grant petitions for certiorari to review the application of state law to a pleading or a set of facts. *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996).

> With "very rare exceptions," . . . we have adhered to the rule in reviewing state court judgments under 28 U.S.C.§ 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. at 88 (citation omitted).

Here no state court has ever ruled on the issued framed by Petitioner as the "question presented," *i.e.*, the nature and extent of a "tenant's" duty to manage hazardous waste under RCRA. The "tenant" was never a party to this proceeding, having filed for bankruptcy protection. The Respondents' duties under federal law were never discussed by the trial court or by the intermediate appellate court, both of which determined merely that alleged breaches of those duties did not give rise to a claim for civil damages. Federal law was never addressed in any way by the Court of Appeals whose action denying a discretionary appeal is the subject of the requested writ.

For purposes of federal diversity jurisdiction, this Court has held:

> We conclude that a complaint alleging a violation of a federal statute as an element of

> a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States." *28 U.S.C. § 1331.*

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 817 (1986)."[7]

If *Merrell* announces the standards for federal question jurisdiction, it is no wonder that Petitioner did not file this case in federal court and, indeed, resisted Respondents' efforts to have the case removed to the federal bankruptcy court overseeing Intracel Corp.'s bankruptcy.

Moreover, if the pleading of alleged RCRA violations as possible evidence of negligence under Maryland law may not be considered a claim arising under the laws of

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[7] This view has evolved in recent years to accommodate federal court jurisdiction over issues of federal law in circumstances not present here: "The question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005). Thus, in *Grable*, federal jurisdiction was properly exercised because: "the federal statute is ... an essential element of [plaintiff's] quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case." *Id.* at 315. No similar factor is present here.

the United States for purposes of federal question jurisdiction, the rejection of those allegations under Maryland law cannot reasonably be interpreted as a challenge to the validity of RCRA itself. At a minimum, the issue is so intertwined with Maryland tort law that this Court's exercise of jurisdiction is not warranted. *Duncan v. Tennessee,* 405 U.S. 127 (1972).

This Court should also recognize that the negligence claim at the center of this Petition was rejected on independent state grounds. In addition to rejecting the alleged RCRA violations as constituting adequate, actionable evidence of negligence, the Court of Special Appeals determined that, although Petitioner had had three chances to plead its case, it consistently "failed to allege any common law duty that was negligently breached by the defendants." (App. 21).

> In large measure, [Petitioner] appears to be attempting to assert that the defendants "negligently" breached the lease contract [which required the tenant to clean up the site upon vacating the premises]. Such an assertion is insufficient to state a cause of action for negligence. *See Heckrotte v. Riddle,* 224 Md. 591, 595 (1961). . . .

(App. 21).

Because the Maryland Court of Special Appeals "rested its decision on both state and federal grounds, either of which would have been dispositive, [this Court] would have . . . no jurisdiction." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (and cases cited therein).

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.... The reason is so obvious that it has rarely upon [sic] thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125 – 126 (1945) (citations omitted). *See, Lee v Kemna*, 534 U.S. 362, 375 (2002); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

C. The Court Properly Rejected Petitioner's RCRA-based Negligence Claim.

In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) this Court held that RCRA does not authorize a private cause of action for recovery of past clean up costs. "RCRA is not principally designed to effectuate clean up of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." *Id.* at 483. "That RCRA's citizen suit provision was not

intended to provide a remedy for past cleanup costs is further apparent from the harm at which it is directed . . . ," *i.e.*, "imminent and substantial danger" to health or to the environment. *Id.* at 485. Thus, "Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA." *Id.* at 487.

In light of the foregoing, in Petitioner's civil suit to recover cleanup costs incurred as a result of Respondents' alleged negligence, the Maryland Court of Special Appeals held that "RCRA was not designed to protect private entities, like ARE, from economic harm." (App. 18). In other words, Petitioner was not "within the class of persons sought to be protected [by RCRA], *and the harm suffered [was not] of the kind which the statute was intended to protect.*" (App. 16 – 17, *quoting Atl. Mut.*, 323 Md. at 124).

According to Petitioner, by reaching this conclusion the Maryland Court of Special Appeals not only ignored a number of federal appellate decisions imposing criminal liability on corporate officers under RCRA, but itself acted improperly "in finding no duty on the part of Respondents." (Petition p. 19).

> We have been unable to find any court of appeals that has endorsed the remarkable notion that a company that abandons materials that constitute hazardous waste has no duty to label them, to store them properly, and, pursuant to a waste manifest, to arrange for their transport to a permitted hazardous waste

> treatment or disposal unit for their proper disposition.

(Petition p. 15). Indeed, the "remarkable notion" has not been endorsed by any Maryland appellate court in this case either.

In fact, the Court of Special Appeals' analysis of the tort implications of RCRA reflects a reasoned approach applying the general principle that "whether or not the Plaintiff can assert a cause of action based on negligence *per se* [by referring to a statute] is an issue akin to whether a private cause of action exists under a statute." *325-343 E. 56th Street Corp. v. Mobil Oil Corp.*, 906 F. Supp. 669, 688 (D. D.C. 1995), *citing Frederick v. Thomas*, 578 F.2d 513, 517 (3rd Cir. 1978); *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 857 F. Supp. 838, 848 (D. N.M. 1994).

> The United States Court of Appeals for the Third Circuit has noted, most formulations of the standards for implying a private cause of action center on the presence or absence of a legislative intent to impose civil liability. In theory, at least, application of the negligence *per se* doctrine represents a judicial policy judgment independent of legislative intent with respect to the imposition of civil liability. Both, however, address the question of whether the policy behind the legislative enactment will be appropriately served by using it to impose and measure civil damage liability.

Id., 906 F. Supp at 688, *citing Frederick*, 578 F.2d at 517 n. 8.

The court in *325-343 E. 56th Street Corp.* addressed the issue under RCRA in the same manner that the Court of Special Appeals addressed it in this case. It reached the same conclusion:

> [T]he court determines that RCRA does not have the specific purpose of protecting a particular class of people. It was enacted to protect the public from soil and water contamination, not to protect a certain class of persons seeking to recover monetary damages. None of the RCRA provisions indicate that the class of persons to be protected is any less broad than the entire population of the United States. Therefore, allowing Plaintiff to proceed with its negligence *per se* claim would be improper.

Id.

Furthermore:

> Having found no express or implied private cause of action for money damages under RCRA, and finding a Congressional intent that the RCRA citizen suit provisions serve only to allow private plaintiffs to act as "private attorney generals," the court determines that Plaintiff's negligence *per se* claim for violations of 42 C.F.R. Pts. 280-81 should be dismissed.

Id.

In fact, it appears to Respondents that every court that has addressed RCRA's use in private civil damages actions has concluded that the statute cannot be used to establish a civil duty owed to a private litigant. *See, Short v. Ultramar Diamond Shamrock,* 46 F. Supp.2d 1199, 1201 (D. Kan. 1999) ("Plaintiffs cannot use the theory of negligence per se to bootstrap a private cause of action for damages when one is not provided by the RCRA. Accordingly, the court concludes that plaintiffs' negligence per se claim for violations of 42 U.S.C. §§ 6901, *et seq.* should be dismissed."); *See also, Abreu v. U.S.,* 468 F.3d 20, 32 (1st Cir. 2006) (Because RCRA explicitly does not provide for private damage actions, "a damage action under the [Federal Tort Claims Act] is not available against the Navy, based on a RCRA violation."); *Avondale Fed. Savings Bank v. Amoco Oil Co.,* 170 F.3d 692 (7th Cir. 1999) (RCRA violations will not support a private cause of action for "restitution"); *Waste, Inc. Cost Recovery Group v. Allis Chalmers Corp.,* 51 F. Supp.2d 936 (N.D. Ind. 1999) (RCRA violations will not support a private cause of action for "contribution"); *Davenport v. Neely,* 7 F. Supp.2d 1219 (M.D. Ala. 1998) (RCRA violations will not support a private cause of action for "indemnity" and "contribution"); *Cross Oil Co. v. Phillips Petroleum Co.,* 944 F. Supp. 787, 789 (E.D. Mo. 1996) (RCRA violations will not support a claim for "strict liability" in respect of past cleanup costs).

In sum, there is no conflict between the ruling of the Maryland Court of Special Appeals and the many federal appellate courts that have imposed criminal responsibility on corporations and corporate officials under RCRA. The Court of Special Appeals never

reached the issue that forms the ostensible basis for the Petition. Instead, the Court of Special Appeals decided, in a manner that represents the logical extension of this Court's ruling in *Meghrig*, that the regulatory scheme embodied in RCRA does not provide a framework for the assertion of tort duties owed to a private litigant, or a proper basis for seeking monetary damages arising out of alleged negligence.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss or deny the Petition by ARE Acquisitions, LLC for a writ of certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

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